No. 11,027

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. URI & Co. (a copartnership), GEORGE URI and MRS. HOUSTON, copartners, doing business under the name of F. Uri & Co.,

Appellants,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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Deputy Administrator for Enforcement,
MILTON KLEIN,
Director, Litigation Division,
DAVID LONDON,
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Table of Authorities Cited

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CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Francis A. Garrecht, Presiding Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellee, Chester Bowles, as Price Administrator of the Office of Price Administration, respectfully petitions this Court pursuant to Rule 25 for a rehearing and reconsideration of its judgment entered herein on December 18, 1945.

The sole issue involved in this case is whether or not one who sells meat cuts, fabricated meat cuts and

edible by-products not only to purveyors of meals but to others as well is a hotel supply house within the following definition:

> " 'Hotel supply house' means a separate selling establishment which is not physically attached to a packing or slaughtering plant, packer's branch house, wholesaler's or other selling establishment; which is engaged in the fabrication of meat cuts and in the sale of fabricated meat cuts, variety meats and edible by-products to purveyors of meals; and which during the period September 15 through December 15, 1942, sold to purveyors of meals, other than war procurement agencies, 70 percent of the total weight volume of meat, variety meats or edible by-products sold by it."

By its decision this Court held that so long as a person otherwise satisfying the requirements of the definition sells at least 70 percent of the total weight volume of meat, variety meats or edible by-products sold by it to purveyors of meals, it is a hotel supply house within the meaning of the foregoing definition. It is respectfully submitted that it was error for this Court so to hold for the following reasons:

1. Three conditions must be met before any selling establishment can qualify as a wholesale supply house. First, it must be a separate selling establishment not physically attached to a packing house, slaughtering plant, packer's branch house, wholesaler's or other selling establishment; secondly, it must be engaged in the fabrication of meat cuts and the sale of fabricated meat cuts to the purveyor of meals; and thirdly, it

must have sold to purveyors of meals during the period from September 15, 1942 through December 15, 1942, 70 percent of the total weight volume meat, variety meats and edible by-products sold by it. The first two conditions are phrased in the present tense, whereas the third is in the past tense. The first two conditions refer to the present and future; the third solely to the past. In holding that a selling establishment otherwise satisfying the requirements of the definition would not lose its status as a hotel supply house if it sells less than 30 percent of the total weight volume of the meat, variety meats and edible by-products to persons other than purveyors of meals, the Court in effect interpolated a qualification into the first and second conditions and recast the definition so as to read as follows:

> " 'Hotel supply house' means a separate selling establishment which is not physically attached to a packing or slaughtering plant, packer's branch house, wholesaler's or other selling establishment; which is engaged in the fabrication of meat cuts and in the sale of *70 percent of the total weight volume of* fabricated meat cuts, variety meats and edible by-products sold by it; and which during the period September 15 through December 15, 1942, sold to purveyors of meals, other than war procurement agencies, 70 percent of the total weight volume of meat, variety meats or edible by-products sold by it."

It is respectfully submitted that the current conditions of the definition should not be qualified in this manner. The 70 percent requirement relates solely to

the period from September 15, 1942 through December 15, 1942. It cannot be carried over into the present.

Unless the qualification is added to the current conditions of the definition, then under the holding of this Court a hotel supply house would be free to sell any amount to purveyors and any amount to retailers. This is the only result that can be reached once the definition is interpreted as to permit sales to retailers as well as to sales to purveyors of meals. A hotel supply house, therefore, would under this Court's interpretation of the definition be at liberty to sell 99 percent to retailers and 1 percent to purveyors of meals. This produces a result that was clearly not intended by the regulation. If a hotel supply house were permitted to sell in this manner there would be no justification for the premium price permitted them by the regulation. The allowance of a premium price to hotel supply houses was made because of the high costs incurred by an establishment dedicated to the business of selling to purveyors of meals, and there would be no justification for granting the premium price if the bulk of a selling establishment's sales were made to retailers. Since the 70 percent requirement can not logically be made a part of the current requirements of the definition, the interpretation urged by the Administrator that a hotel supply house must sell exclusively to purveyors of meals, produces the only reasonable result and the only one consistent with the obvious intent of the regulation.

2. Contrary to this Court's assumption, the Administrator has never taken a position at variance to that which he urges here. This Court lays stress on the provision of Section 1364.172(b) of Revised Maximum Price Regulation 239, which prohibits hotel supply houses from selling to persons other than purveyors of meals at the prices allowed on sales to purchasers of meals. This provision was contained in the regulation when it was first issued and when the present definition of the term "hotel supply house" did not exist. Under the original definition of that term there was no limitation on the class of purchasers to whom hotel supply houses could sell. Accordingly the prohibition contained in Section 1364.172(b) against the sale to persons other than purveyors of meals at prices allowed on sales to purveyors of meals was incorporated. It has no bearing on the meaning of the present definition and lends no support to the conclusion that hotel supply houses may still sell to persons other than purveyors of meals.

The excerpt from the statement of considerations which, agreeable to the provisions of Section 2(a) of the Emergency Price Control Act the Administrator issued when he promulgated amendments to the regulations incorporating the present definition of hotel supply house, is nothing more than a rephrasing of the definition itself. It in no way interprets or amplifies the definition of a hotel supply house as contained in the regulation. It simply recites in almost verbatim language the basic provisions of the definition in the

regulation. No different meaning can be drawn from the statement of considerations which cannot be drawn from the language of the definition itself. Both the definition in the regulation and the statement of considerations use the past tense "sold" with reference to the 70 percent requirements.

Nor does the excerpt from the opinion of the Administrator which he rendered in denying the protest of *Oswald & Hess Co.* support the conclusion that a hotel supply house may sell to others than purveyors of meals. That opinion dealt solely with the 70 percent requirement, which, as said before, relates solely to the period from September 15 to December 15, 1942 and not with the current requirements of the regulation. Moreover, it was issued on July 6, 1944, approximately 10 months after the issuance of the official interpretation to the effect that one who sells to others than purveyors of meals is not a hotel supply house, and approximately one month after the Administrator rendered his opinion in *Patek-Ecklon* to the same effect.

There is nothing in Section 1364.407(e) providing for the keeping of records or in Section 1364.454(5) relating to local delivery charges which in any way supports the conclusion that a hotel supply house, within the meaning of the regulation, may sell to others than purveyors of meals. Both of those sections pertain not only to hotel supply houses but to wholesalers as well. In drafting the regulation the Administrator had the alternative of putting in separate para-

graphs the record keeping and local delivery provisions for each type of seller, or lumping all sales together in a single paragraph. For purposes of simplification and brevity, he elected to use the alternative of lumping all sales together. It would be unreasonable to draw from this choice of techniques of draftsmanship an inference that it was intended that hotel supply houses should be permitted to sell to others than purveyors of meals.

3. Nor may any inference from the policy underlying the adoption of amendment 12 to Maximum Price Regulation 169, to which this Court refers, which will support the conclusion that the Administrator intended to permit hotel supply houses to sell to retailers. The prices which the regulations permit to be charged on sales to purveyors of meals lead to the diversion of sales from retail stores. The limitation of the definition of hotel supply houses was designed to limit the number of sellers who could sell at the premium price established by the regulation for sales by hotel supply houses. This limitation was designed primarily to prevent packers and slaughterers who would normally sell to retailers from diverting their business from this class of purchasers to purveyors of meals. The lower prices for sales by slaughterers was considered as some deterrent to their engaging extensively in sales to purveyors of meals. The major method which the Administrator adopted, however, to prevent diversion of normal business from retailers was the quota limitations imposed by amend-

ment 12. The quota limitations had nothing at all to do with the definition of hotel supply houses or to price levels for sales to purveyors of meals. The quota limitations on all sellers to purveyors of meals were designed to prevent packers and slaughterers who control the source of supply from selling unlimited quantities to purveyors of meals. Their sales to purveyors of meals being limited, packers and slaughterers would necessarily have to sell the balance of their meat to other classes of the trade, such as retailers. It should be emphasized that the basic policy of preventing undue diversion of meat to purveyors of meals was designed to compel slaughterers and packers to sell to retailers rather than diverting all of their supplies to purveyors of meals. The limitation of persons who could be hotel supply houses and the quota provisions of the regulation were directed primarily at placing limitations on slaughterers who control the source of supply.

4. In holding that an administrative interpretation of a regulation is not entitled to weight unless issued concurrently with the regulation, this Court appears to have misconceived the holding of the Supreme Court in *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410. In the *Seminole* case many of the interpretations which the Supreme Court relied upon were issued long after the regulation had been promulgated. As a matter of fact there is seldom occasion to issue an interpretation until after a regulation has been issued and outstanding for a period of time. They are issued

ordinarily only upon request by persons in doubt as to the meaning of the regulation. Consequently it rarely happens that such interpretations are issued concurrently with the promulgation of the regulation. Therefore to limit the rule laid down by the Supreme Court that such an interpretation becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation it interprets, to interpretations which are issued simultaneously or concurrently with the regulation, is virtually to deny the existence of the rule. Moreover, the Supreme Court has held that an administrative interpretation announced for the first time at the commencement of a lawsuit is entitled to weight. (*Skidmore v. Swift & Co.*, 323 U. S. 134.) That case dealt with the interpretation of the statute. Certainly if an administrative interpretation of a statute is entitled to weight, even though announced for the first time during the course of a lawsuit, an interpretation issued by an administrative body of its own regulation should be entitled to greater weight. The Administrator, of course, concedes that he is without power to amend a regulation in the guise of interpreting it, but no such situation is involved here, for the interpretation is wholly consistent with the plain language of the regulation.

CONCLUSION.

For the foregoing reasons, this petition for a rehearing should be granted.

Dated, February 6, 1946.

Respectfully submitted,

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,
MILTON KLEIN,
Director, Litigation Division,
DAVID LONDON,
Chief, Appellate Branch,
ALBERT M. DREYER,
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HERBERT H. BENT,
Regional Litigation Attorney,
Attorneys for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

I, Albert M. Dreyer, hereby certify that I am one of the counsel for the Administrator in the above-entitled action; that in my judgment the foregoing petition for a rehearing is well founded and that it is not interposed for delay.

Dated, February 6, 1946.

ALBERT M. DREYER,
Of Counsel for Appellee and Petitioner.

Due service and receipt of a copy of the within is hereby admitted

this.....day of February, 1946.

.....

Attorneys for Appellants.